

1 HONORABLE RICHARD A. JONES
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 SUSAN CASSERD,

11 Plaintiff,

12 v.

13 CAROLYN W. COLVIN, in her capacity
14 as Acting Commissioner of the Social
15 Security Administration,

16 Defendant.

17 CASE NO. C14-451RAJ

18 ORDER

19 **I. INTRODUCTION**

20 This matter comes before the court on the Report and Recommendation (“R&R”)
21 (Dkt. # 19) of the Honorable Brian A. Tsuchida, United States Magistrate Judge. The
22 court has considered the R&R, the briefs the parties submitted to Judge Tsuchida, and the
23 Administrative Record (“AR”). For the reasons stated below, the court DECLINES TO
24 ADOPT the ultimate recommendation of the R&R, REVERSES the July 27, 2012
25 decision of the administrative law judge (“ALJ”), and REMANDS this action to the
26 Social Security Administration (“SSA”) with instructions to award disability benefits for
27 a disability beginning on April 1, 2009. The clerk shall enter judgment for Plaintiff.

28 **II. BACKGROUND**

No one disputes that Plaintiff Susan Casserd suffers chronic back pain following
two surgeries in 2004 that she hoped would remedy back pain she experienced before the
surgeries. The dispute before the court is to what extent Ms. Casserd’s pain is disabling.

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1 After a January 2012 hearing, an ALJ determined that Ms. Casserd's pain would
2 not prevent her from performing her past relevant work, and that she was therefore not
3 disabled. The ALJ could not have reached that determination by relying on evidence
4 from Ms. Casserd, because she has reported consistently since at least 2009 that her pain
5 prevents her from sitting for more than 20 to 30 minutes at a time, that even that much
6 sitting requires at least a day of recovery, and that she is therefore unable to work. The
7 physicians whom Ms. Casserd saw regularly from 2009 to 2011 do not suggest that she is
8 exaggerating her pain or that her pain is inexplicable in light of objective medical
9 findings. The only evidence in the record that contradicts Ms. Casserd's reporting are
10 two evaluations: one from a physician who never examined Ms. Casserd, and another
11 from a physician who examined her once and produced a report that even the ALJ
12 declined to give much weight. The ALJ nonetheless concluded that Ms. Casserd's
13 account of the debilitating effect of her pain was not credible, that her treating physicians
14 were not credible (in large part because they believed Ms. Casserd), and that the
15 physician who never examined Ms. Casserd gave the most accurate version of her
16 residual functional capacity ("RFC").

17 Ms. Casserd appealed. The R&R points to a number of errors in the ALJ's
18 determination: there was not sufficient evidence to discredit Ms. Casserd, that the ALJ
19 had neither a basis to determine that Ms. Casserd's pain was purely psychological nor to
20 discount the debilitating effect of her pain on that basis, and that the ALJ had offered
21 invalid reasons for discounting the views of her treating physicians. The R&R concludes,
22 however, that the ALJ did not err in disbelieving Ms. Casserd because her reports about
23 the disabling effect of her pain were inconsistent with her reported daily activities. For
24 the same reason, the R&R finds no error in the ALJ's decision to discount the testimony
25 of Ms. Casserd's treating physicians, who believed her account of her pain. The R&R
26 also found no error in the R&R's conclusion that one of Ms. Casserd's treating

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1 physicians reached an RFC determination that was internally inconsistent. For those
 2 reasons, Judge Tsuchida recommends that the court affirm the ALJ's decision.

3 No one objected to the R&R.

4 III. ANALYSIS

5 A. Standard of Review

6 Although no party has objected to the R&R, the court will review it de novo. Rule
 7 72(b)(3) of the Federal Rules of Civil Procedure, which applies to a magistrate judge's
 8 recommended disposition of a dispositive matter, mandates de novo review of "any part
 9 of the magistrate judge's [recommended] disposition that has been properly objected to."
 10 The Federal Magistrates Act similarly declares that for dispositive recommendations
 11 from magistrates, a district court judge "shall make a de novo recommendation of those
 12 portions of the report or specified proposed findings or recommendations to which
 13 objection is made." 28 U.S.C. § 636(b)(1). Both Rule 72 and the Magistrates Act are
 14 silent as to what standard of review applies to a magistrate's recommended disposition
 15 when no party objects to it. The Supreme Court has stated that although the Magistrates
 16 Act "does not require the judge to review an issue de novo if no objections are filed, it
 17 does not preclude further review by the district judge, *sua sponte* or at the request of a
 18 party, under a *de novo* or any other standard." *Thomas v. Arn*, 474 U.S. 140, 154 (1985)
 19 (noting that district court judge had conducted de novo review of magistrate judge's
 20 proposed disposition of a habeas petition even though no party had objected).¹ The

21 ¹ The court acknowledges Ninth Circuit authority mandating that a district court conduct de novo
 22 review of legal conclusions in a magistrate judge's dispositive recommendation even if no party
 23 objects. *Barilla v. Ervin*, 886 F.2d 1514, 1518 (9th Cir. 1989) ("[A] failure to file objections
 24 only relieves the trial court of its burden to give *de novo* review to factual findings; conclusions
 25 of law must still be reviewed *de novo*.). *Barilla* concerned a magistrate's recommended
 26 disposition of a summary judgment motion, concluding that because the decision to grant
 27 summary judgment is "purely legal," de novo review was mandatory. *Id.* Later Ninth Circuit
 precedent is consistent with the Supreme Court's decision in *Thomas*. *United States v. Reyna-*
Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003) ("The statute makes it clear that the district judge
 must review the magistrate judge's findings and recommendations *de novo* if objection is made,
 but not otherwise."). Because the court's disposition today is consistent with *Thomas*, *Reyna-*
Tapia, and *Barilla*, the court need not resolve any tension between *Barilla* and *Reyna-Tapia* or
 determine whether *Barilla* is consistent with the Supreme Court's decision in *Thomas*.

1 Advisory Committee notes to Rule 72 declare as to a magistrate's dispositive
2 recommendation that “[w]hen no timely objection is filed, the court need only satisfy
3 itself that there is no clear error on the face of the record in order to accept the
4 recommendation.” As the court will discuss in the next subsection, the record in this case
5 reveals clear error in the ALJ’s decision.

6 Where “substantial evidence” supports an ALJ’s factual finding, the court
7 generally must affirm it. *Bray v. Comm’r of SSA*, 554 F.3d 1219, 1222 (9th Cir. 2009)
8 (“Substantial evidence means more than a mere scintilla but less than a preponderance; it
9 is such relevant evidence as a reasonable mind might accept as adequate to support a
10 conclusion.”) (citation omitted). In certain circumstances, such as when an ALJ rejects a
11 claimant’s testimony about the severity of her impairments, a higher standard applies.
12 *Greger v. Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006) (requiring “specific, cogent
13 reasons” for rejecting claimant’s testimony, and “clear and convincing evidence” where
14 there is no evidence of malingering). Similarly, an ALJ can reject the uncontradicted
15 opinions of a treating or examining medical provider only where clear and convincing
16 evidence supports that decision. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995).
17 Even where medical evidence contradicts the opinion of a treating or examining provider,
18 the “ALJ may only reject it by providing specific and legitimate reasons that are
19 supported by substantial evidence.” *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir.
20 2014). The court does not defer to the ALJ’s legal conclusions. *Bray*, 554 F.3d at 1222.

21 A five-step process determines whether an applicant is disabled. *See* 20 C.F.R.
22 §§ 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). An applicant is disabled if, for a period of
23 sufficient duration, she can perform neither her past relevant work nor any other work
24 available in the national economy. In the first step, the applicant must show that she did
25 not engage in substantial gainful activity during a relevant time period. If she did, then
26 she is not disabled. If she did not, then the claimant must show at the second step that
27 she has a “severe impairment” that limits her ability to work. 20 C.F.R. § 404.1520(c).

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If so, she must show at the third step that over the course of at least a year, her impairment “meets or equals” an impairment listed in applicable regulations. If it does, she is disabled. If not, the ALJ must determine, between step three and step four, the applicant’s RFC, which is an assessment of the applicant’s “ability to work after accounting for her verifiable impairments.” *Bray*, 554 F.3d at 1222-23. The applicant must demonstrate at step four that her RFC is such that she cannot perform her past relevant work. *See* 20 C.F.R. § 404.1520(f) (noting that an applicant who can perform past relevant work is not disabled). If she cannot, then the burden shifts to the SSA to demonstrate that her RFC permits her to perform other jobs that exist in substantial numbers in the national economy. *See Bray*, 554 F.3d at 1223 (describing allocation of burdens in five-step process).

In this case, the dispute arises at steps four and five. Ms. Casserd asserts that the evidence establishes an RFC more restrictive than the one that the ALJ developed, and that this more restrictive RFC does not permit her to work.

B. Review of Administrative Record

To determine whether the ALJ drew permissible conclusions from the record as to Ms. Casserd’s RFC, the court reviews the administrative record, focusing on evidence relevant to Ms. Casserd’s back pain.² The court begins with evidence from Ms. Casserd’s treating physicians.

1. Evidence From Treating Physicians

The two physicians who treated Ms. Casserd most frequently were Dr. Arne Anderson, who specializes in “non-operative spine care,” AR 642, and her family practitioner, Dr. Teresa Pliskowski. She saw both physicians frequently from 2009 to at least early 2012. She reported back pain every time she saw them. Although some of the

² Ms. Casserd claims exertional limitations arising from other physical conditions, as well as limited concentration as a result of her pain and depression. The court’s disposition today does not require it to consider the ALJ’s conclusions as to any condition other than Ms. Casserd’s painful back.

1 physicians' notes regarding her reporting were more detailed than others, they reveal no
2 inconsistencies. She reported to Dr. Anderson in June 2009 that she experienced
3 "significant pain" if she sat for any length of time, and that sitting too long required
4 "prolonged recovery for days or weeks afterward." AR 385. She noted that driving
5 provoked her pain. AR 386. In the June 2009 visit with Dr. Pliskowski that preceded her
6 visit with Dr. Anderson, she reported chronic back pain. AR 401. She reasserted
7 previous reports of back pain to Dr. Anderson in October 2009, AR 381-82, and to Dr.
8 Pliskowski in August 2010, AR 361. She consulted with Dr. Pliskowski about limiting
9 her pain medication in April 2011. AR 541. She emailed Dr. Anderson and Dr.
10 Pliskowski repeatedly in May 2011 because her pain left her unable to drive to a
11 pharmacy to pick up pain medication. AR 523. She reported worsening pain to Dr.
12 Pliskowski in July 2011. AR 515.

13 Because she continued to struggle with pain, she consulted Dr. Anderson in
14 November 2011 about other treatment options. AR 500. In an email to Dr. Anderson in
15 November 2011, she described her efforts to deal with pain at length. AR 493-95. She
16 described attempts to strengthen her body with exercise and to reduce her use of
17 medication, all of which resulted in "zero improvement in her ability to sit or stand still."
18 AR 494. She described a then-recent incident when she drove 15 minutes to pick up her
19 brother to attend a funeral, laid in the car while he drove for the remainder of the trip,
20 stood throughout the service, laid in the car again on the return to her brother's home,
21 then drove another 15 minutes. AR 494. That experience left her incapacitated for the
22 remainder of the day and the following day. AR 494.

23 Although she saw other providers less frequently than Dr. Anderson and Dr.
24 Pliskowski, her reports to them were consistent. She told a physician's assistant in April
25 2009 that back pain kept her from riding in a car or sitting for any extended period of
26 time. AR 412. In October 2010, she reported to Dr. Marie Boudreaux, a rehabilitation
27 specialist to whom Dr. Anderson had referred her, that sitting was the activity that caused
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1 her the most pain. AR 476. She reported to a family practice physician in November
2 2011 that her pain made it difficult to drive. AR 490. The most encouraging report in the
3 record is her February 2011 report to Dr. Boudreux when she stated that she was now
4 able to swim twice per week, and that the swim (plus the short drive to and from the
5 pool) would only disable her for a day. AR 550. She nonetheless was unable to increase
6 her tolerance for sitting. AR 550.

7 At Ms. Casserd's request, Dr. Anderson submitted an evaluation to the SSA in
8 January 2012. AR 637-42. He opined that she could not sit, stand, or walk for more than
9 20 to 30 minutes at time. AR 638. He opined that assuming she alternated between
10 sitting, standing, or walking, she could perform those activities for no more than a
11 combined 3 hours per day. AR 638. He also checked a box indicating that she could
12 "[n]ever" drive. AR 641. A letter that Dr. Anderson wrote on Ms. Casserd's behalf in
13 December 2011 reached the same conclusions, except as to her inability to drive.
14 AR 633-34 ("Given the routine that she [has] described to me it seems very unlikely that
15 she would be able to sustain a work presence of any significance.").

16 Dr. Boudreux also drafted an evaluation of Ms. Casserd, albeit based only one
17 examination at the request of Dr. Anderson. AR 472. Relying largely on Ms. Casserd's
18 reporting, Dr. Boudreux stated in March 2011 that she could stand or walk for less than
19 2 hours in a workday, and that even if she alternated between sitting and standing, she
20 could do so for no more than 4 hours in a workday. AR 473.

21 **2. Evidence From Ms. Casserd and Her Family**

22 Ms. Casserd's own descriptions of her back pain mirror those reflected in her
23 providers' notes. She testified in her January 2012 hearing that she could no longer teach
24 classes (which she had done in her most recent work as a life coach), because a two-hour
25 class left her in debilitating pain for two or three days. AR 50-51. She testified that she
26 currently makes a small amount of money coaching over the telephone, while lying on
27 her back. AR 52, 272. In a September 2011 report she submitted to the SSA, she

1 explained that she drove at most twice per week, that she could drive for no more than 30
2 minutes at a time, and that it would take her 3 to 4 days to recover from a drive. AR 266.
3 She explored taking a real estate sales exam in May 2010, but requested accommodation
4 to permit her to take the test while lying down. AR 635. Dr. Anderson signed that
5 accommodation request. AR 635.

6 Ms. Casserd's parents both declared that she does not sit for more than 20 minutes
7 at a time. AR 82-83, 255.

8 **3. Evidence from Non-Treating Physicians**

9 The ALJ requested an additional medical examination to occur after the January
10 2012 hearing. AR 18. Dr. William Brendel conducted the examination in April 2012.
11 He reviewed Dr. Boudreaux's October 2010 notes, the results of MRIs from 2004 and
12 2005, the report on her April 2004 back surgery, and no other records. AR 650. Ms.
13 Casserd reported to him that "long trips, prolonged sitting, prolonged standing, and
14 prolonged walking all make her back significantly worse for several days and then will
15 gradually improve again. AR 650. He conducted a physical examination, AR 652-54,
16 diagnosed her with conditions affecting her lower spine, and opined that had reached
17 "maximal medical improvement related to her low back symptoms." AR 654. He opined
18 that Ms. Casserd could lift and carry up to 20 pounds without limitation, AR 644, up to
19 25 pounds without limitation, AR 654, and that she could lift up to 50 pounds
20 "occasionally", AR 654. He opined both that she could sit for up to 8 hours per workday,
21 AR 645, and that she could sit for up to 6 hours per workday, AR 654. He opined both
22 that she could stand for 7 hours and walk for 5 hours per workday, AR 645, and that her
23 [m]aximum standing and walking capacity" was 6 hours in a workday, AR 654.

24 In June 2011, Dr. Robert Bernandez-Fu reviewed some of Ms. Casserd's medical
25 records (through February 2011), AR 112-13, and concluded that she could frequently lift
26 10 pounds, occasionally lift up to 20 pounds, stand or walk for 6 hours in a workday, and
27 sit for 6 hours in a workday, AR 116. Dr. Bernandez-Fu contended, based on a subset of
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1 the records that this court has reviewed, that Ms. Casserd had indicated that “she cannot
 2 do anything because of chronic pain,” but that she still “live[d] alone and still [was] able
 3 to drive/shop and do light house chores and self care.” AR 117.

4 **C. There is No Substantial Evidence Supporting the ALJ’s Finding that Ms.
 5 Casserd Testified Incredibly about the Disabling Effect of Her Back Pain.**

6 The ALJ could reject Ms. Casserd’s testimony only with clear and convincing
 7 evidence. *Greger*, 464 F.3d at 972 (requiring “specific, cogent reasons” for rejecting
 8 claimant’s testimony, and “clear and convincing evidence” where there is no evidence of
 9 malingering). There is no evidence in the record that Ms. Casserd is a malingerer, and
 10 the ALJ did not conclude otherwise.³

11 The ALJ found that Ms. Casserd’s “medical history and examination findings”
 12 were inconsistent with her testimony about the debilitating effect of her back pain.
 13 AR 25. The R&R finds this conclusion erroneous, and the court concurs. Putting aside
 14 the evaluations of Dr. Brendel and Dr. Fernandez-Fu, there is no medical record that is
 15 inconsistent with Ms. Casserd’s testimony. Ms. Casserd’s reports to her physicians were
 16 invariably consistent with her testimony. None of her treating physicians expressed
 17 skepticism about her reporting. More importantly, none of them pointed to any objective
 18 medical evidence that was inconsistent with her reporting. The ALJ points to various
 19 findings that she had “normal range of motion,” “full motor strength,” normal results on
 20 various tests, and other objective evidence. AR 26. But there is nothing but the ALJ’s
 21 own supposition to support the conclusion that this evidence was inconsistent with the
 22 pain that Ms. Casserd reported. Certainly Ms. Casserd’s treating physicians pointed to no
 23 inconsistency, although they either developed or considered all of the objective evidence
 24 that the ALJ cited. Dr. Anderson is a spinal specialist, but he pointed to no objective
 25 evidence that led him to doubt Ms. Casserd’s reports about her pain. Dr. Pliskowski

26 ³ The ALJ believed it significant that Ms. Casserd had not followed up on Dr. Boudreaux’s
 27 recommendation to pursue rehabilitative therapy. AR 27 (citing AR 358-59). No one, including
 28 Dr. Boudreaux, opined that her inability to work was the result of her unwillingness to seek help.
 Dr. Boudreaux noted, at most, that rehabilitation therapy might be a helpful alternative.

1 treated her more frequently than any other physician, including many visits devoted
2 entirely to pain management, and she expressed no concern that objective evidence was
3 inconsistent with Ms. Casserd's reported pain. Dr. Boudreaux's lengthy notes following
4 her October 2010 examination suggest neither skepticism about Ms. Casserd's reports on
5 her pain nor concerns about objective evidence inconsistent with those reports. AR 476-
6 79. Although Dr. Brendel and Dr. Bernandez-Fu assessed Ms. Casserd's limitations as
7 much less severe than she reported, none of them stated (much less explained) that
8 objective evidence was inconsistent with Ms. Casserd's reporting.

9 The ALJ's insistence on objective evidence is inconsistent with Ms. Casserd's
10 chief complaint – debilitating pain. As the Ninth Circuit has noted, pain defies objective
11 quantification. *E.g., Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989) (“Unlike most
12 medical conditions capable of supporting a finding of disability, pain cannot be
13 objectively verified or measured.”). No one disputes that the back problems that Ms.
14 Casserd had before and after her 2004 surgeries would be expected to produce pain, and
15 “once the claimant produces objective medical evidence of an underlying impairment, the
16 adjudicator may not reject a claimant’s subjective complaints based solely on a lack of
17 objective medical evidence to fully corroborate the severity of pain.” *Bunnell v. Sullivan*,
18 947 F.2d 341, 345 (9th Cir. 1991) (en banc). The ALJ did just that, and thus erred.

19 The ALJ also concluded that Ms. Casserd's reported daily activities were
20 inconsistent with her reporting about the impact of her pain. AR 27. The ALJ cited her
21 self-employment as a life-coach, her daily routine of feeding and caring for several
22 animals, performing physical therapy, cooking for herself, and shopping for herself. AR
23 27. The ALJ also relied on testimony and evidence that she rode her horse about twice
24 per month, swam once or twice per week, and occasionally rode a bicycle. AR 27.

25 The ALJ's conclusion that Ms. Casserd's daily activities showed that she could
26 work is unsupportable. Ms. Casserd testified about her daily routine. She explained that
27 she felt best in the morning after waking up, and during that time she fed her pets and two
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1 horses, handled phone calls and email, and spent an hour an a half doing therapeutic
2 exercise. AR 61. The court can only guess why the ALJ believed that Ms. Casserd's
3 testimony that she stretched and then "d[id] an hour of physical therapy exercises," "most
4 of [which] ha[d] been prescribed for [her]," was inconsistent with her reports of pain.
5 Similarly, the court has no idea how the ALJ reached the conclusion that Ms. Casserd's
6 reports that she engaged in minimal work, over the telephone, while lying on her back,
7 AR 52, 272, undermined her reports of disabling pain.

8 The ALJ's conclusions about Ms. Casserd's reports of horseback riding,
9 swimming, and biking are also unsupported by evidence. Ms. Casserd typically spent her
10 afternoons either resting because she was "totally drained" or "really hurting," or, when
11 she felt up to it, riding her horse or swimming. AR 62. She explained how she relied on
12 a neighbor to lift hay bales to feed her two horses. AR 64. She explained in detail how
13 riding her horse made her back feel better, at least temporarily. AR 66-68. Even so, she
14 explained that she could not ride more than once every week or two because more would
15 "be too much for [her] back." AR 67. She explained that swimming (no more than twice
16 per week) also made her back feel better, AR 68-69, although it left her exhausted
17 afterward. She also explained that infrequent bike rides of no more than 20 minutes
18 made her back feel better. AR 70. She shared all of this information with her treating
19 physicians. *E.g.*, AR 385 (reporting swimming, horseback riding, and biking to Dr.
20 Anderson), AR 412 (reporting to physician's assistant that horseback riding helped her
21 back), AR 478 (reporting to Dr. Boudreux in October 2010 that a session of swimming
22 required a week of recovery), AR 550 (reporting to Dr. Boudreux that she felt she was
23 improving because swimming only required a day of recovery). None of them stated that
24 her reported activity undermined her reported pain. Indeed, Dr. Anderson thought it
25 "unclear why she can ride horseback and bicycles without much difficult but sitting in a
26 car causes so much pain for her," but opined that it "must be a mechanical effect relating
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1 to the surgery or her anatomy,” not an indication Ms. Casserd was exaggerating her pain.
2 AR 388.

3 The R&R recommends that the court conclude that the ALJ’s decision to discredit
4 Ms. Casserd’s reporting because of her reported activity was a “reasonable interpretation
5 of the record.” The court concludes otherwise. The medical providers who treated Ms.
6 Casserd did not believe her daily activity was inconsistent with her reports of disabling
7 pain. The ALJ neither cited evidence nor offered reasoning sufficient to support a
8 contrary conclusion.

9 The court adopts the R&R to the extent it concludes that the ALJ had no basis for
10 a final reason for disbelieving Ms. Casserd: that Ms. Casserd had no “significant barrier
11 to sedentary work besides her own belief that her pain precludes such activity.” AR 27,
12 R&R at 8-9. The court’s disposition today does not require it to address the ALJ’s
13 assessment of the extent to which Ms. Casserd’s mental health limited her ability to work,
14 or evidence regarding Ms. Casserd’s mental health. It suffices to note that no physician
15 questioned that Ms. Casserd’s back pain had a physiological origin. That pain adversely
16 impacted her mental health, which may have exacerbated the debilitating impact of her
17 pain. No evidence supports the notion that Ms. Casserd could overcome her pain by
18 ceasing to “believe” that it was debilitating.

19 There is no substantial evidence, much less clear and convincing evidence,
20 sufficient to reject Ms. Casserd’s testimony about the debilitating effect of her pain. With
21 no adequate basis to reject Ms. Casserd’s testimony, it is not strictly necessary to consider
22 whether various physician’s evaluations of Ms. Casserd’s functional capacity were
23 credible. Crediting Ms. Casserd’s testimony as true, which the court must on this record,
24 she was not capable of working. The court nonetheless considers the medical evaluations
25 of her functional capacity, which support the same conclusion.

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1 **D. The ALJ Had No Sufficient Basis to Reject the Evaluations of Dr. Boudreux
2 and Dr. Anderson and Rely Largely on the Evaluation of Dr. Hernandez-Fu.**

3 As noted, Dr. Anderson opined that Ms. Casserd could not sit, stand, or walk for
4 more than 20 to 30 minutes at time. AR 638. He opined that assuming she alternated at
5 least that frequently between sitting, standing, or walking, she could do so for no more
6 than a combined three hours per day. AR 638. Dr. Boudreux stated that Ms Casserd
7 could stand or walk for less than two hours in a workday, and that even if she alternated
8 between sitting and standing, she could do so for no more than four hours in a workday.
9 AR 473. The vocational expert who testified at Ms. Casserd's hearing opined that she
10 could not work if she were absent once per week, or if she had to have four five-minute
11 breaks in an hour. AR 94. There is no doubt that under either Dr. Boudreux's or Dr.
12 Anderson's assessments of her functional capacity (not to mention Ms. Casserd's own
13 assessment of her functional capacity), Ms. Casserd could not work.

14 As treating physicians,⁴ the ALJ could reject Dr. Anderson or Dr. Boudreux's
15 evaluations only in limited circumstances. The ALJ was obligated to either point to clear
16 and convincing evidence undermining their opinions, *Lester*, 81 F.3d at 830, or to point
17 to a medical opinion that contradicted their opinions and "specific and legitimate
18 reasons" supported by substantial evidence, *Garrison*, 759 F.3d at 1012. The ALJ did not
19 meet those obligations.

20 As to Dr. Boudreux, the ALJ criticized her conclusions only because she relied
21 on Ms. Casserd's reports on the severity of her pain. AR 29. With no proper basis to
22 reject those reports, the ALJ had no basis to reject Dr. Boudreux's opinions relying on
23 them.

24 As to Dr. Anderson, the ALJ gave "little weight" to his opinions for several
25 reasons. AR 31. As was the case with Dr. Boudreux, the ALJ criticized Dr. Anderson

26 ⁴ The court acknowledges that it would be plausible to designate Dr. Boudreux as an examining
27 physician rather than a treating physician, given that she treated Ms. Casserd only once.
Nonetheless, her evaluation of Ms. Casserd was at the request of Dr. Anderson, and for the
purpose of assisting in Ms. Casserd's treatment. The court's disposition today would be no
different if it treated Dr. Boudreux as an examining physician.

1 for relying on Ms. Casserd's reporting about the extent of her pain. The ALJ demanded
2 "objective evidence" to support those reports, ignoring that objective evidence
3 established that Ms. Casserd was expected to have back pain. The ALJ thought that Dr.
4 Anderson erred by not concluding, as the ALJ did, that Ms. Casserd's reported daily
5 activities were inconsistent with her reports. And finally, the ALJ concluded that Dr.
6 Anderson was "acting as an advocate in the claimant's request for a finding of disability."
7 AR 31. The ALJ reached that conclusion because when Ms. Casserd asked Dr. Anderson
8 to provide an evaluation for use in her benefits claim, he agreed to do so, and noted "I
9 typical put people at capable of some activity so I would not say you are totally disabled
10 but at the next category up." AR 559. The court has no idea how this demonstrates
11 unacceptable "advocacy" on Dr. Anderson's part.

12 The R&R finds no error in the ALJ's discounting of Dr. Anderson's evaluation
13 only because the ALJ correctly noted that Dr. Anderson erred in asserting that Ms.
14 Casserd could "[n]ever" drive. AR 31, 641; R&R at 13. The court's best guess is that
15 Dr. Anderson erred in checking this box; his evaluation otherwise mirrors Ms. Casserd's
16 reporting. There was no reason for Dr. Anderson to deliberately overstate the extent of
17 Ms. Casserd's limitations; her reported limitations were more than adequate to support
18 his conclusions. Even if he had wanted to overstate her limitations, it makes little sense
19 to do so by opining that she could sit for 20-30 minutes at a time but could "never" drive.
20 But even if the court were wrong, and Dr. Anderson had deliberately overstated Ms.
21 Casserd's driving limitations, that would not constitute sufficient evidence to reject his
22 opinions to the extent they were grounded in Ms. Casserd's reporting. The ALJ
23 apparently agrees. He gave significant weight to Dr. Fernandez-Fu's evaluation, even
24 though it contained the erroneous statement that the record contains evidence that Ms.
25 Casserd "cannot do anything because of chronic pain . . ." AR 117. If a single error
26 was no basis to reject Dr. Fernandez-Fu's evaluation, it was no basis to reject Dr.
27 Anderson's evaluation.

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1 The only medical evidence supporting the ALJ's point of view are the evaluations
2 of Dr. Brendel, an examining physician, and Dr. Fernandez-Fu, a non-examining
3 physician. The ALJ, to her credit, appears to have recognized that Dr. Brendel's
4 evaluation had no basis in fact. No one believes, as Dr. Brendel did, that Ms. Casserd
5 could sit all day. The ALJ thought that Ms. Casserd's "MRI findings justif[ied]
6 limitations in excess of those opined by Dr. Brendel . . ." This court would go further:
7 the entirety of the record demonstrates limitations in excess of those that Dr. Brendel
8 assessed.

9 Ultimately, the opinion of Dr. Fernandez-Fu was the only opinion the ALJ gave
10 "significant weight." AR 30. The ALJ found that opinion, which Dr. Fernandez-Fu
11 supported solely with the incorrect statement that Ms. Casserd had testified that she
12 "cannot do anything" and a citation of the same household activities that the court has
13 already found are wholly consistent with Ms. Casserd's reports of disabling pain, AR
14 117, was controlling. The court rules that reliance on a single, cursory opinion from a
15 non-examining physician is not a "specific and legitimate" reason to reject the
16 evaluations of all of Ms. Casserd's examining physicians.

17 **E. Crediting the Improperly Rejected Evidence as True, It Is Appropriate To
18 Remand for an Award of Benefits.**

19 Where an ALJ lacks a sufficient basis to reject either medical evidence or
20 testimony from a disability claimant, the court may credit that testimony as true.
21 *Garrison*, 759 F.3d at 1020. Where the record is fully developed, and the improperly
22 rejected or discounted testimony establishes that the claimant is disabled, the court has
23 discretion to remand for an award of benefits rather than for a new hearing before an
24 ALJ. *Id.*

25 In this case, the court concludes that the record is fully developed and that it is
26 appropriate to credit as true Ms. Casserd's descriptions of the debilitating effect of her
27 pain as well as the evaluations of Dr. Anderson and Dr. Boudreax. Her description and

1 her physicians' evaluations demonstrate that she cannot perform jobs that exist in
2 significant numbers. The court will remand this action to the SSA for an award of
3 benefits.

4 **IV. CONCLUSION**

5 For the reasons stated above, the court DECLINES TO ADOPT the R&R,
6 REVERSES the July 27, 2012 decision of the administrative law judge, and REMANDS
7 this action to the SSA with instructions to award disability benefits based on an onset
8 date of April 1, 2009.

9 The clerk shall enter judgment for Ms. Casserd and ensure that Judge Tsuchida
10 receives notice of this order.

11 DATED this 17th day of December, 2014.

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15 The Honorable Richard A. Jones
16 United States District Judge
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